Malaysian International Merchant Bankers Bhd v Chi Liung Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7-24-1496-1989
LIM BENG CHOON J
27 FEBRUARY 1992

Civil Procedure *— Costs — Application for sale of charged land — Legal fees incurred by chargee — Whether chargee could claim for legal fees in charge action — Whether charge agreement could entitle chargee to claim for legal fees — National Land Code 1965 ss 242, 268(1) & Form 16A — Rules of the High Court 1980 O 59 r 3(1), O 83 rr 1(1)(a), 3(3) & (6)*

Land Law *— Charge — Legal fees — Whether chargee could claim for legal fees in charge action — Whether charge agreement could entitle chargee to claim for legal fees — National Land Code 1965 ss 242, 268(1) & Form 16A — Rules of the High Court 1980 O 83 rr 1(1)(a), 3(3) & (6)*

Land Law *— Charge — Statutory demand — Validity — Whether chargee should serve letter of demand before issuing statutory demand — National Land Code 1965 Form 16D*

Land Law *— Charge — Summons — Chargor made part payments to chargee after issue of originating summons — Sum claimed in summons exceeded sum actually due from chargor — Whether summons was defective — Whether defect in summons could be cured by chargee's supplemental affidavits showing exact sum due under the charge*

The defendants charged their lands to the plaintiffs as security for credit facilities provided by the plaintiffs to the defendants. Upon the defendants' failure to repay the facilities, the plaintiffs served statutory notices of demand Form 16D on the defendants demanding payment. The defendants then made some part payments but did not fully settle the sum due to the plaintiffs. The plaintiffs applied to the High Court for an order for sale of the defendants' lands under s 256 of the National Land Code 1965 ('the Code'). The defendants firstly argued that the Form 16D served was defective because there was no proof of an earlier demand made by the plaintiffs. The defendants then argued that Form 16D was defective because it did not mention the amount of repayments made by the defendants and thus did not reflect the actual sum owing to the plaintiffs. The defendants further contended that the plaintiffs had no right to claim for legal fees amounting to $9,935 in a charge action.

Held, allowing the application except for the claim for legal fees:

(1) It was clear from Form 16D itself that a prior letter of demand had been served on the defendants before Form 16D was issued and served on the defendants. There was no need for the plaintiffs to annex the said letter of demand as an exhibit in their affidavit because the defendants had not raised a dispute as regards the defects in the earlier letter of demand. Indeed the defendants'

affidavit in reply did not mention that they were not served with a prior letter of demand before the service of Form 16D. There was therefore no merit in the defendants' first point.

(2) The defendants only made the repayments after the service of Form 16D. Obviously the amount of repayments could not be reflected in the Form 16D itself.

(3) In an application for an order for sale of charged land under s 256 of the Code, the chargee can only claim for moneys due to him under the loan together with interests and any expenses incurred by the chargee in respect of any quit rent or outgoings owed by the chargor to any state or local authority. This is supported by s 268(1) of the Code which stipulates the items to which the purchase price can be utilized. Accordingly the purchase price cannot be utilized to pay for legal fees which is not an item specified in s 268(1) of the Code.

(4) It is also clear from O 83 rr 1(1)(a), 3(3) and (6) of the Rules of the High Court 1980('the rules') that the plaintiffs were not entitled to claim for legal fees. More importantly it remained a mystery as to how the plaintiffs arrived at the amount of legal fees of $9,935. In any event, O 59 r 3(1) of the rules provides that costs of the plaintiffs' application could only be recovered under an order of court.

(5) The stipulation in the charge annexure that the defendants must indemnify the plaintiffs for legal expenses did not give the plaintiffs a right to claim for legal fees in a charge action. The plaintiffs should apply separately to the court for recovery of legal expenses which must be taxed unless agreed by the parties.

(6) It is also clear from s 242 and Form 16A of the Code that the only claim recognized in a charge action must relate to the total amount due under the charge which comprises the capital sum lent with interest arising thereon. A claim for legal fees is foreign in a charge action.

(7) The defendants had failed to settle the loan not only within the time stipulated in Form 16D but even up to the date of this judgment. Moreover, while the capital sum and the interests amounted to over $1.5m, the legal fees came to only $9,935. Under such circumstances it was highly inequitable to dismiss the plaintiffs' application because one of the maxims of equity is that equity will not suffer a wrong without a remedy.

(8) The proper thing to do was therefore to allow the plaintiffs' application for an order for sale of the lands but revoking their claim for legal fees.

(9) Since the defendants had made some repayments to the plaintiffs after the institution of the action, the plaintiffs' originating summons was purportedly defective because the amount claimed therein was more than what was actually due from the defendants. The plaintiffs, however, had given more than sufficient particulars of the defendants' repayments and the amount of interests in their several supplemental affidavits. Accordingly any

purported defect in the plaintiffs' originating summons had been cured by the supplemental affidavits which showed the exact amount due under the charge at the date of the making of the affidavits. If it were otherwise, it would be highly unfair to the plaintiffs for the court to hold its application defective merely because the defendants chose to make some repayments at diverse dates after the institution of the plaintiffs' action.

[Bahasa Malaysia summary

Defendan telah menggadai tanah mereka kepada plaintif sebagai jaminan untuk kemudahan kredit yang diberi oleh plaintif kepada defendan. Apabila defendan gagal membayar balik kemudahan itu, plaintif telah menyampaikan notis tuntutan statutori Borang 16D kepada defendan menuntut pembayaran. Defendan kemudian membuat beberapa pembayaran sebahagian tetapi tidak menyelesaikan sepenuhnya jumlah wang yang kena dibayar kepada plaintif. Plaintif memohon kepada Mahkamah Tinggi untuk satu perintah penjualan tanah defendan di bawah s 256 Kanun Tanah Negara 1965 ('Kanun itu'). Defendan pertamanya berhujah bahawa Borang 16D yang disampaikan itu cacat kerana tiada bukti tuntutan terdahulu telah dibuat oleh plaintif. Defendan kemudian berhujah bahawa Borang 16D cacat kerana ia tidak menyebut amaun pembayaran balik yang dibuat oleh defendan dan oleh itu tidak membayangkan dengan sebenarnya jumlah wang yang terhutang kepada plaintif. Defendan selanjutnya berhujah bahawa plaintif tidak berhak menuntut fee undang-undang sebanyak $9,935 dalam tindakan gadaian itu.

Diputuskan, membenarkan permohonan itu kecuali tuntutan fee undang-undang:

(1) Jelas daripada Borang 16D sendirinya bahawa sepucuk surat tuntutan terlebih dahulu telah disampaikan kepada defendan sebelum Borang 16D dikeluarkan dan disampaikan kepada defendan. Tidak perlu untuk plaintif melampirkan surat tuntutan tersebut sebagai ekshibit dalam afidavitnya kerana defendan tidak menimbulkan sebarang pertikaian tentang kecacatan di dalam surat tuntutan yang lebih awal itu. Tentu saja afidavit jawapan defendan tidak menyebut yang mereka tidak disampaikan dengan surat tuntutan terlebih dahulu sebelum penyampaian Borang 16D. Oleh kerana itu tiada merit terdapat dalam hujah pertama defendan.

(2) Defendan hanya membuat pembayaran balik selepas penyampaian Borang 16D. Jelas amaun pembayaran balik tidak dapat dibayangkan di dalam Borang 16D itu.

(3) Dalam permohonan untuk perintah penjualan tanah tergadai di bawah s 256 Kanun itu, pemegang gadaian hanya boleh menuntut wang yang kena dibayar kepadanya di bawah pinjaman itu bersama dengan bunga dan sebarang perbelanjaan yang ditanggung oleh pemegang gadaian berkenaan dengan sebarang cukai tanah atau

belanja pasti (outgoings) yang terhutang oleh penggadai kepada sebarang pihak berkuasa negeri atau tempatan. Ini disokong oleh s 268(1) Kanun itu yang menentukan perkara-perkara yang untuknya harga pembelian boleh digunakan. Oleh kerana itu harga pembelian itu tidak boleh digunakan untuk membayar fee undang-undang yang bukan perkara yang ditentukan dalam s 268(1) Kanun itu.

(4) Jelas juga daripada A 83 kk 1(1)(a), 3(3) dan (6) Kaedah-Kaedah Mahkamah Tinggi 1980 ('kaedah itu') bahawa plaintif tidak berhak menuntut fee undang-undang. Yang lebih penting ia tetap menjadi misteri bagaimana plaintif mendapat amaun fee undang-undang sebanyak $9,935. Bagaimanapun, A 59 k 3(1) kaedah itu memperuntukkan bahawa kos permohonan plaintif hanya boleh didapat balik di bawah satu perintah mahkamah.

(5) Peruntukan dalam lampiran kepada gadaian itu bahawa defendan mesti menanggung rugi plaintif bagi perbelanjaan dalam tindakan undang-undang tidak memberi plaintif hak menuntut fee undang-undang dalam tindakan gadaian. Plaintif harus membuat permohonan berasingan kepada mahkamah untuk mendapat balik perbelanjaan dalam tindakan undang-undang yang mesti ditetapkan oleh mahkamah kecuali dipersetujui oleh kedua belah pihak.

(6) Jelas juga daripada s 242 dan Borang 16A Kanun itu bahawa tuntutan tunggal yang diberi pengiktirafan dalam suatu tindakan gadaian mesti berhubung dengan amaun sepenuhnya yang kena dibayar di bawah gadaian itu yang terdiri daripada jumlah wang modal yang dipinjamkan bersama dengan bunga yang timbul daripadanya. Tuntutan fee undang-undang adalah asing dalam tindakan gadaian.

(7) Defendan gagal menyelesaikan pinjaman itu bukan hanya di dalam masa yang ditentukan dalam Borang 16D malah sehingga tarikh penghakiman ini. Tambahan pula sedangkan wang modal dan bunga itu berjumlah lebih daripada $1.5 juta, fee undang-undang hanya berjumlah $9,935. Dalam keadaan begitu adalah sangat tidak saksama jika permohonan plaintif ditolak kerana satu daripada pepatah ekuiti ialah ekuiti tidak akan menerima sesuatu kesalahan tanpa memberi remedi.

(8) Oleh kerana itu apa yang patut dibuat ialah membenarkan permohonan plaintif untuk perintah penjualan tanah itu tetapi membatalkan tuntutan fee undang-undang mereka.

(9) Oleh kerana defendan telah membuat beberapa pembayaran balik kepada plaintif selepas permulaan tindakan ini, saman pemula plaintif dikatakan kononnya cacat oleh sebab amaun yang dituntut di dalamnya lebih daripada yang sebenarnya kena dibayar oleh defendan. Plaintif, akan tetapi, telah memberi butir-butir yang lebih daripada mencukupi tentang pembayaran balik defendan dan amaun bunga dalam beberapa afidavit tambahan mereka. Oleh kerana itu sebarang kecacatan yang kononnya ada dalam saman pemula plaintif telah diperbaiki oleh afidavit tambahan yang menunjukkan amaun tepat yang kena dibayar di bawah

gadaian itu pada tarikh pembuatan afidavit itu. Jika sebaliknya, akan menjadi sangat tidak adil kepada plaintif bagi mahkamah memutuskan permohonannya cacat semata-mata kerana defendan memilih untuk membuat beberapa pembayaran balik pada tarikh berlainan selepas permulaan tindakan plaintif.]

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02–147–92.]

Cases referred to

1 *Central Malaysian Finance Bhd v Loke Kok Lai* [1975] 1 MLJ 160 (distd)
2 *Development & Commercial Bank Bhd v Che Wan Development Sdn Bhd & Ors* [1990] 1 MLJ 12 (refd)
3 *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 (folld)
4 *Campbell v Commercial Banking Co of Sydney* [1879] 2 NSWLR 375 (folld)
5 *Malayan Banking Bhd v Lim Chee Leng & Anor* [1985] 1 MLJ 214 (folld)
6 *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 (folld)

Legislation referred to

National Land Code 1965 ss 242, 249(1)(a), 254, 256, 268(1), Forms 16A, 16D
Rules of the High Court 1980 O 59 r 3(1), O 83 rr 1(1)(a), 3(3), (6)

Thilakan Ramalingam (*Nahappan Dorairaj & Danker*) for the plaintiffs.
GT Rajan (*GT Rajan & Co*) for the defendants.

Cur Adv Vult

Lim Beng Choon J: This is an application for an order for sale by public auction under s 256 of the National Land Code 1965 ('the Code') by Malaysian International Merchant Bankers Bhd, the plaintiffs, in respect of the lands held under Grant for Land No 11263 Lot No 52 Sek 1, Grant for Land No 11264 Lot No 53 Sek 1 and Grant for Land No 11265 Lot No 54 Sek 1 all in the Village of Sungei Pelek owned by Chi Liung Holdings Sdn Bhd, the defendants, and charged to the plaintiffs under Charge Presentation No 2035/87 Vol 237 Folio 131 and lands held under HS(D) 7036 Lot No 7776 in the Mukim of Bukit Raja, HS(D) 7670 PT No 21786 and HS(D) 8024 PT No 21787 both in the Mukim of Klang again owned by the defendants and charged to the plaintiffs under Charge Presentation No 2037/87 Vol 2137 Folio 133 to recover the sum of $2,129,108.37 being the outstandings due as at 10 May 1989 together with interest thereon as from 11 May 1989 till date of full settlement. There was the usual request for an order that the court fix a date for the said auction to be carried out, and that the senior assistant registrar should fix the reserve price for the purpose of the sale.

According to the affidavit of the defendants affirmed on 10 July 1989 (encl 2), at the request of the defendants, the plaintiffs agreed to make available to the defendants credit facilities of a principal sum of $2m (hereinafter referred to as 'the CLH charge') and for the purpose of securing repayment of the said facilities and interest thereon, the defendants on the same day, that is 5 January 1987, executed two first legal charges over the lands mentioned earlier in favour of the plaintiffs which said charges had been registered by the Pendaftar Hakmilik Selangor on 25 February 1987 vide the two charge presentations I mentioned earlier. By the terms of the said two legal charges the defendants agreed to pay to the plaintiffs on demand the said facilities or such other sum for the time being owing on the loan account of the defendants with the plaintiffs together with interest thereon and together with all such other sums and moneys as are or may become payable by the defendants under the said two legal charges. Pursuant to cl 4.5(2) of the said supplemental charge the plaintiffs could from time to time increase and vary the interest rate without notice to the defendants. In spite of the repeated requests by the plaintiffs to the defendants to repay the outstanding amount in full together with the interest due thereon the defendants had refused and/or neglected and/or failed to do so. Consequently on 29 May 1989 the plaintiffs through their solicitors served by AR registered post two notices in accordance with the provisions of s 254 of the Code on the defendants demanding payment of the sum of $2,122,359.80 being the outstanding moneys due and owing by the defendants to the plaintiffs together with interest thereon within 14 days from the date of service of the said notices. Since the sending of the two notices mentioned earlier, the defendants had made some payments and the outstanding sum due and owing by the defendants to the plaintiffs as at 10 May 1989 was $2,129,108.37 together with accrued interest thereon. The relevant documents were annexed to the affidavit as exhibits to which I shall be referring when necessary.

In opposing the application of the plaintiffs, the defendants, through their company secretary, affirmed an affidavit on 2 March 1990 in which it was asserted that firstly, 'the notice of default with respect to a charge served on the defendant under the National Land Code s 254 is defective in law and does not reflect the actual sum owing to the plaintiff'. Secondly, the defendants asserted that 'the plaintiff further claims the same sum in another matter under Originating Summons No S6-24-1495-89 which would amount to duplication of actions seeking a claim far in excess of what the defendant owes the plaintiff'. Lastly, the defendants put the plaintiffs to strict proof of the claim and in the premises the defendants requested 'the foreclosure proceedings' be dismissed with costs.

Thereafter the plaintiffs filed a number of supplemental affidavits, the contents of which are similar, if not the same, showing:

(a) the amount of the advance;
(b) the amount of the repayment;
(c) the amount of interest in arrears and the amount remaining due under the charges as at the date of the issue of the originating summons and at the date of the affidavit;

(d) legal fees; and
(e) the interest rate of 3%pa above the bank's costs of funds after the date of the affidavit.

At the hearing of the application of the plaintiffs on 22 October 1991, counsel for the defendants raised a number of contentions which may be summarized as follows:

(1) As there was no proof that an earlier notice of demand had been made, statutory notice of demand Form 16D was therefore defective.
(2) It was stated in the statutory notice of demand Form 16D that the total liability was $2,122,359.80 comprising:

Principal sum of	$2,000,000
Interest	120,498.59
Additional interest	1,861.21
Total	$2,122,359.80

But in the latest supplemental affidavit of the plaintiffs affirmed on 18 October 1991 (encl 23) the total amount claimed was:

(a) Loan advanced $2m
(b) Amount of repayment $663,936.28

In the statutory notice of demand Form 16D no mention was made of the amount of repayment. There was therefore a discrepancy. Counsel cited the case of *Central Malaysian Finance Bhd v Loke Kok Lai*[1] in support of this contention of his.

(3) Again in the latest supplemental affidavit of the plaintiffs (encl 23) it mentioned legal fees in the sum of $9,935. Counsel contended that the plaintiffs had no right to claim legal fees as such fee must go for taxation by the senior assistant registrar.
(4) The plaintiffs had varied the interest rate from 2% to 3% above the costs of funds without serving on the defendants. This omission was contrary to cl 4.5 of the charge annexure which stipulated that any increase in the rate must be preceded by a notice informing the defendants that the interest rate would be increased as from a specified date.
(5) The statutory notice of demand Form 16D was served on Chi Liung Holdings Sdn Bhd as chargor but according to the charge annexure the chargor was defined as Chi Liung & Sons Sdn Bhd. It was clear therefore that the said Form 16D was served on a wrong party.
(6) The plaintiffs were wrong in serving two statutory notices of demand Form 16D at the same time when under the National Land Code 1965 they should serve only one notice.

Counsel for the plaintiffs in his submission retorted that it was only after the statutory notice of demand Form 16D was sent and received by the defendants did the latter make some payments. This was clearly stated in para 9 of the plaintiffs' affidavit in respect of their application (encl 2). Moreover any defect in the enclosure had been cured by the several supplemental affidavits of the plaintiffs which clearly showed the amount of repayment

made by the defendants. In any event, so said counsel, s 254 of the Code did not provide for prior notice of demand to be made before Form 16D could be served. As regards the legal fees, counsel contended that in the charge annexure exhibited as 'AGH3' to encl 2, cl 11.4 thereof stipulated that the borrower/chargor must indemnify the bank for legal expenses. Furthermore cl 13.15 thereof stipulated that the statements, books and records of the bank would be conclusive evidence of the amount of principal, interest and other fees owing to the bank. Counsel cited the case of *Development & Commercial Bank Bhd v Che Wan Development Sdn Bhd & Ors*[2] in support of his contention. Counsel then went on to submit that pursuant to the charge annexure exhibited as 'HGH1' to encl 2, cl 4.5(2) thereof specified that no notice of variation of interest was required to be served on the defendants regarding any variation. With regard to the definition of Chi Liung & Sons Sdn Bhd as the chargor in the supplemental charge, counsel contended that this company was the owner of lands which were not the subject matter of this action. Those other lands were charged by them under a charge presentation which was being disputed in another action filed in Court 6. Finally counsel submitted that the plaintiffs had to serve two statutory notices of demand Form 16D because in the present case there were two legal charges.

In his reply counsel for the defendants submitted, inter alia, that the said cl 13.15 mentioned by counsel for the plaintiffs to show that the said clause indicated that the amount due was conclusive was wrong as there was no mention as to who in the office of the plaintiffs could say that the amount due was conclusive.

I shall now turn to the six points of contention raised by counsel for the defendants as adumbrated earlier. In respect of the first point it is to be noted that in the statutory notice of demand Form 16D dated 29 May 1969, the relevant statement in the second paragraph thereof reads as follows:

> Whereas you have committed a breach of the provisions of this charge by:
>
> failing or neglecting to pay *inspite of a letter of demand dated 11 May 1989* and given by the chargee through their solicitors the outstanding balance due and owing under the said charge ... (Emphasis supplied.)

It is clear from this statement that a prior letter of demand had been served on the defendants before the statutory notice of demand Form 16D was issued and served on the defendants. To my mind there is no need for the plaintiffs to annex the said letter of demand dated 11 May 1989 as an exhibit in the plaintiffs' affidavit simply because the contention of counsel was that there was no notice of demand served on the defendants prior to the service of the statutory notice of demand Form 16D and not that the defendants had raised a dispute as regards any defect in the earlier letter of demand. Indeed in the defendants' affidavit in reply affirmed on 2 March 1990 there was no mention at all that the defendants were not served with a prior letter of demand before the service of Form 16D. It must therefore follow that the aforementioned statement appearing in Form 16D not being contradicted must be true (see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd*[3] at p 385). There is therefore no merit in the first point.

Turning to the second point, likewise there is no merit in the contention simply because it was only after the service of the statutory notice of demand Form 16D that the defendants made repayments. Under such circumstances it is obvious that the amount of repayments could not be reflected in the statutory notice of demand Form 16D which was served on the defendants prior to any repayment being made to the plaintiffs. The *Loke Kok Lai case*[1] relied on by counsel is of no assistance to the defendant in respect of this contention for in that case it was decided there that the exact amount claimed must be specified in the application. It did not deal with what was specified in Form 16D which is merely a notice requiring the breach of the provisions specified in the charge to be remedied. In any event it was held by the Privy Council in *Campbell v Commercial Banking Co of Sydney*[4] at p 385 that:

> As to the first of these grounds, the learned judges of the Supreme Court have held, and in their Lordships' opinion, have correctly held, not only that a notice under the Act is not bad because it demands more than is due, and that the jury should have been so instructed (a ruling which affects principally the finding on the second issue), but that where a demand does not do away with the necessity for tendering what is actually due, unless there is at the same time refusal to receive less.

With regard to the third point, there is much force in this contention raised by counsel for the defendants. To my mind the plaintiffs have no right to claim for what they call legal fees in the sum of $9,935 in an action for order for sale under s 256 of the Code. I say so for the following reasons. The purpose of the charging of land is to secure the repayment of a loan together with interests arising thereon. It must therefore follow that in an application for an order for sale of the charged land, the chargee can only claim for moneys due to him under the loan together with the interests and any expenses incurred by the chargee in respect of any quit rent or outgoings owed by the chargor to the state authority or any local authority. This proposition is supported by s 268(1) entitled 'Application of purchase money' which reads:

> The purchase money arising on any sale under this Chapter shall be applied as follows —
>
> (a) firstly, in the payment of rent to the State Authority or the lessor (according as the charge was a charge of land or of a lease) and, so far as no person other than the chargor was responsible therefor, any other outgoings payable to the State Authority or any local authority;
>
> (b) secondly, in the payment of the expenses (as certified by the Registrar of the Court or Land Administrator, as the case may be) incurred *in connection with the making and carrying into effect, of the order for sale*;
>
> (c) thirdly, in the payment to the chargee of the total amount due under the charge at the time of the sale;
>
> (d) fourthly, in the case of a charge to secure the payment of an annuity or other periodic sum, in accordance with any provision for the satisfaction of payments subsequently falling due included therein pursuant to paragraph (b) of subsection (2) of section 242; and
>
> (e) fifthly, in the payment off of subsequent charges, if any, in the order of their priority. (Emphasis supplied.)

Since s 268(1) clearly stipulates the items to which the purchase price can be utilized, the purchase price cannot be utilized to make payment to any item *not* specified therein. It cannot be gainsaid that the so-called 'legal fees' is not an item specified in that section. Furthermore the application of the plaintiffs for an order for sale is made under O 83 of the Rules of the High Court 1980 and under para (a) of r 1(1) of that order it is clearly stated that the order is applicable in respect of a claim for payment of moneys *secured by the charge*. Likewise it is provided in sub-r (3) read with sub-r (6) of r 3 of the order that the plaintiff should give the following particulars in their affidavit in support of their application:

(a) the amount of the advance;
(b) the amount of the repayment;
(c) the amount of interest or instalments in arrear at the date of the issue of the originating summons and at the date of the affidavit;
(d) the amount remaining *under the charge*. (Emphasis supplied.)

Again it is obvious from O 83 r 3 that the plaintiffs are not entitled to claim for the so-called 'legal fees' in a charge action for if it were otherwise O 83 r 3 would have required the plaintiffs to give details of the legal fees incurred by them. Finally and more importantly, it remains a mystery as to how the plaintiffs arrived at the so-called 'legal fees' of $9,935. In the absence of any details regarding the purported 'legal fees' this court has the right to question them as to whether the amount of legal fees is a reasonable and fair amount. Furthermore in the present application they are also asking for '*the costs of and incidental to this application*' which included solicitors' fees. It might well be that part of the costs of and incidental to this application has already been taken into account in the sum of $9,935 which they claimed as 'legal fees'. In any event it is provided in O 59 r 3(1) that:

> Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings *except under an order of the Court*. (Emphasis supplied.)

For the aforementioned reasons I agree with counsel for the defendants concerning the third point of contention notwithstanding that it is stipulated in cl 11.4 of the charge annexure that the defendants must indemnify the plaintiffs for legal expenses. Such a stipulation does not give a right to the plaintiffs to claim for 'legal fees' in the charge action — they must apply separately to the court for recovery of the legal expenses which must be taxed unless the parties agree to the amount of the legal expenses.

With regard to the fourth point, I have taken note of the fact that the increase of the interest rate to 3%pa was mentioned by the plaintiffs only in all their supplemental affidavits in which it was stated that interest after the date of the affirmation of the said affidavits was to be 3%pa 'above the bank's costs of funds'. There is no mention of any increase in the interest rate in the affidavit in support of the plaintiffs' application. Based on these facts, it is clear to me that the plaintiffs had not attempted to let alone increase the agreed rate of interest from the date the loan was granted until the institution of this action. It follows therefore even if counsel was right in

stating that the rate of interest should not be increased without notice he is in effect asking me to disallow the increase asked for from the date of judgment to the date of realization which is a matter for me to decide whether to accede to the suggestion of counsel. Bearing in mind that it is provided in cl 4.5(2) that:

> Notwithstanding the above, the bank reserves the right and at its absolute discretion to vary the prescribed rate without notice to the borrower and such varied rate(s) shall be payable from the date appearing in the bank's ledger,

it is my considered opinion that I should exercise my discretion in favour of the plaintiffs since they have been deprived of the use of the moneys due and payable to them for quite some time. Furthermore even if a notice was required, the supplemental affidavits filed by the plaintiffs in this action can be considered as sufficient notice — see *Malayan Banking Bhd v Lim Chee Leng & Anor.*[5] The fourth point of contention raised by counsel must therefore be rejected.

As to the fifth point of contention, the short answer is that there is no merit at all in this contention simply because Chi Liung & Sons Sdn Bhd is described in the recital of the charge annexure as chargor of lands that are not the subject matter of this action. Counsel for the plaintiffs in his submission had stated that the lands held by Chi Liung & Sons Sdn Bhd was the subject matter of a different action which was being litigated in Court 6 and I accept his statements. The fifth point of contention must again be rejected.

Finally the sixth point of contention. Again the short answer to this contention is that I am in full agreement with the submission of counsel for the plaintiffs when he said that as there were two separate charges the plaintiffs therefore took steps to serve two separate notices of demand. The Code does not specifically prohibit the service of two or more statutory notices of demand when there are more than one charge. The sixth point of contention is rejected.

The next question is: in view of my findings as adumbrated, what order should I make? In considering this matter it is important for me to bear in mind that counsel for the defendants has successfully argued that the plaintiffs are not entitled to the costs incurred by them as legal fees. Such a claim for legal fees is foreign to a charge action. The only claim recognized in a charge action must relate to the total amount due under the charge which usually comprises the capital sum lent as security with interest arising thereon. This is clearly stated in s 242 and Form 16A of the Code. In the present case there is no dispute that the amount claimed in respect of the capital sum of the loan granted to the defendants and the accrued interest arising thereon is correct (see the points raised by counsel for the defendants as adumbrated above and the affidavit of the defendants affirmed on 2 March 1990). The only dispute is that the statutory notice of demand Form 16D did not reflect the actual sum owing to the plaintiff. I have already dealt with this matter (see the discussion regarding the second point of contention as set out above).

That being the case I think it is highly inequitable for me to dismiss the application of the plaintiffs for an order for sale of the lands which are

subject to the charges for one of the maxims of equity is that equity will not suffer a wrong without a remedy. Here we have a situation where the defendants have failed to repay the loans and the accrued interests arising thereon in accordance with the charges which pursuant to s 249(1)(a) of the Code they are statutorily obliged to repay. In failing to comply with their obligations the plaintiffs are entitled to ask this court for an order to sell the lands which have been charged to secure the repayment of the loans and interests pursuant to s 256 of the Code. The court is enjoined to grant the order for sale of the lands unless it can be shown that there is 'cause to the contrary'. The scope of s 256 has been explained by the Federal Court in the case of *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors.*[6] The principle laid down by the Federal Court regarding the scope of s 256 has been upheld by the Privy Council when that case went on appeal to the Privy Council notwithstanding that the Privy Council reversed the decision of the Federal Court based on the ground that the Federal Court had drawn erroneous inferences from the facts of the case. There are two other points which I have taken into consideration in determining the order I should make, namely: (i) the defendants have failed to settle their statutory and contractual obligations to settle the loan and the interests not only within the time stipulated in the statutory notice of demand Form 16D but even up to the date of this judgment; and (ii) while the capital sum of the loan and interests amount to over $1.5m the legal fees prayed for comes to only $9,935, a fraction of the loan and interests. Under such circumstances justice would not be done to the present case if I were to dismiss the application of the plaintiffs for an order for sale of the charged lands. To my mind the proper thing for me to do is to allow the application of the plaintiffs for an order for sale of the lands but revoking their claim for the legal fees.

There is one final matter that I should mention although this matter was not raised by counsel for the defendants in his submission and neither was it specifically averred in the affidavit of the defendants affirmed on 2 March 1990. There is no doubt that the defendants had made some repayments toward the capital sum of the loan after the service of the relevant Form 16D and after the institution of this action. These repayments had been taken into account by the plaintiffs in assessing the capital sum of the loan and interests due and payable to them. Thus in the plaintiffs' supplemental affidavit affirmed on 5 December 1989 it was stated that:

(i) Loan advanced	—	$2,000,000
(ii) Amount of principal repayment	—	$ 63,936.28
(iii) Amount remaining due under the said charge as at 7 December 1989 amounted to	—	$1,953,310.71

Similar averments were made in the plaintiffs' supplemental affidavits affirmed on 24 May 1990 and 12 November 1990 respectively. The amounts remaining due under the charge as was stated in the two affidavits, however, had increased since the interest kept on accumulating for the period when the capital sum remained unpaid. In the supplemental affidavit of the plaintiffs affirmed on 24 June 1991 it was averred that:

(i)	Loan advanced	—	$2,000,000
(ii)	Amount of principal repayment	—	$ 663,936.28
(iii)	Amount remaining due under the charge as at 30 June 1991 amounted to	—	$1,669,002.74

Comparing the averments of this supplemental affidavit with the earlier supplemental affidavits of the plaintiffs it is obvious that sometime between November 1990 and June 1991 the defendants again made some repayments toward the capital sum which repayments amounted to something like $600,000. Similar averments were contained in two further supplemental affidavits of the plaintiffs affirmed on 24 July 1991 and 1 October 1991 respectively which I need not set out. I need only touch on the final supplemental affidavit of the plaintiffs affirmed on 18 October 1991 in which it was averred that the amount remaining due under the charge as at 22 October 1991 amounted to $1,728,115.66 inclusive of the sum of legal fees of $9,935. Based on these facts it may be argued that since in their application made by way of originating summons the plaintiffs are asking for more than what they are entitled to, their originating summons is therefore defective, following the ruling of Hashim Yeop A Sani J (as he then was) in *Central Malaysian Finance Bhd v Loke Kok Lai*[1] where the application of the plaintiff there was held to be defective on the ground that the exact amount claimed was not specified in the application. To my mind the ruling of the learned trial judge must be read within the context of the facts and circumstances of the case dealt with by him. There the plaintiffs' claim was for a further sum being additional interest at the rate of 12%pa with yearly rests to be added in their claim for the sum of $1,419,749.88. The plaintiffs' claim in that case was clearly contrary to O 83 r 3(3) of the Rules of the High Court 1980 which provides, inter alia, that the chargee must give particulars of the *amount* of any interest at the date of the issue of the originating summons and at the date of the affidavit. In the present case the plaintiffs have given more than sufficient particulars relating to the amount of the interests in their several supplemental affidavits. More importantly the cause of the difference in the amount as claimed in the originating summons was caused by the defendants in making some repayments after the filing of the originating summons, It is therefore inevitable that the amount as claimed in the originating summons must proportionately be reduced as a consequence of such repayments. The plaintiffs have taken into account these repayments and the same have been reflected in their several supplemental affidavits. It must therefore follow that any purported defect in the originating summons has been cured by the supplemental affidavits which show the exact amount due under the charge. The step taken by the plaintiffs is reasonable and proper in law for if it were otherwise it would be highly unfair to the plaintiffs for the court to hold that their application is defective merely because the defendants chose to make some repayments at diverse dates after the institution of the plaintiffs' action. To elaborate this point supposing that a defendant chooses to make some ten repayments after the plaintiff has instituted an action in the belief that such repayments would cause the plaintiff to stay his action notwithstanding that the repayments are highly insufficient to settle the amount

due and payable to the plaintiff, must the plaintiff amend his originating summons ten times in order to reflect the exact amount due to him? Is it not enough that he puts in supplemental affidavits to show the exact amount due to him after taking into account the amount of repayments? Surely the answer must be that it is sufficient for the plaintiff to state in his supplemental affidavits the exact amount due to him as at the date of the making of the said affidavits.

For the reasons stated above, I therefore make the following orders:

(a) the claim of the plaintiffs for an order for sale of the lands specified in the originating summons by public auction is allowed to recover the sum of $1,718,411.81 after deduction of the legal fees in the sum of $9,935;
(b) interest (if any) imposed on the non-payment of the said legal fees is disallowed and must accordingly be deducted;
(c) order in terms of prayers (2) to (6).

Application allowed in part.

Reported by Wong Kian Kheong